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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 GLENDA NISSEN,

9 Plaintiff,

v.

10 MARK LINDQUIST, et al.,

11 Defendants.

CASE NO. C16-5093 BHS

ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANTS' MOTION TO
DISMISS

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13 This matter comes before the Court on Defendants Mark Lindquist ("Lindquist"),
14 Mark and Chelsea Lindquist, and Pierce County's ("County") (collectively "Defendants")
15 motion to dismiss. Dkt. 56. The Court has considered the pleadings filed in support of
16 and in opposition to the motion and the remainder of the file and hereby grants in part
17 and denies in part the motion for the reasons stated herein.

18 **I. PROCEDURAL HISTORY**

19 On February 1, 2016, Plaintiff Glenda Nissen ("Nissen") filed a complaint against
20 Defendants in Pierce County Superior Court for the State of Washington. Dkt. 1, Ex. A.
21 Nissen asserted causes of action for violations of her constitutional rights, abuse of
22 process, invasion of privacy, constructive discharge, outrage, violations of Washington

1 Law Against Discrimination, RCW Chapter 49.60 (“WLAD”), and breach of contract.

2 *Id.*

3 On February 5, 2016, Defendants removed the matter to this Court. Dkt. 1.

4 On February 22, 2016, Defendants moved to dismiss. Dkt. 9. On April 20, 2016,
5 the Court granted the motion and granted Nissen leave to amend. Dkt. 18.

6 On April 28, 2016, Nissen filed an amended complaint. Dkt. 20. On May 12,
7 2016, Defendants filed a motion to dismiss. Dkt. 25. On August 11, 2016, the Court
8 granted the motion in part and requested supplemental briefing. Dkt. 30. On January 3,
9 2017, the Court granted the motion in part and requested supplemental briefing. Dkt. 37.

10 On January 20, 2017, Nissen filed a motion to amend. Dkt. 39. On March 13,
11 2017, the Court granted the remainder of Defendants’ motion and granted Nissen’s
12 motion. Dkt. 44.

13 On March 17, 2017, Nissen filed a second amended complaint (“SAC”). Dkt. 45.
14 On September 7, 2017, Defendants filed a motion to dismiss the SAC. Dkt. 56. On
15 September 25, 2017, Nissen responded and filed an appendix for the convenience of the
16 Court. Dkt. 57. On September 29, 2017, Defendants replied and moved to strike the
17 appendix. Dkt. 58.¹

18 **II. FACTUAL BACKGROUND**

19 Nissen was a police officer with the County. Nissen allegedly spoke out against
20 Lindquist as a prosecutor. Nissen also filed public record act requests that subsequently

21 ¹ The Court denies the motion to strike as moot because the appendix is irrelevant to the
22 consideration of any issue in the case.

1 turned into state court cases seeking to obtain records that Lindquist refused to produce.
2 Nissen alleges that she experienced retaliation for her actions, which led to a settlement
3 agreement between her and the County. Nissen, however, alleges that the County and its
4 employees failed to honor the agreement and continued to retaliate against her.
5 Eventually, Nissen resigned alleging a constructive discharge.

6 **III. DISCUSSION**

7 Instead of attacking the complaint as a whole, Defendants attack specific
8 allegations and arguments as being implausible. Nissen has definitely provided ample
9 irrelevant and implausible material. Nissen, however, must only assert one plausible
10 allegation for each element of a claim to survive a motion to dismiss.² As discussed
11 below, Nissen has met this minimal burden on all but one of her claims.

12 **A. Standard**

13 Motions to dismiss brought under Rule 12(b)(6) of the Federal Rules of Civil
14 Procedure may be based on either the lack of a cognizable legal theory or the absence of
15 sufficient facts alleged under such a theory. *Balistreri v. Pacifica Police Department*,
16 901 F.2d 696, 699 (9th Cir. 1990). Material allegations are taken as admitted and the
17 complaint is construed in the plaintiff's favor. *Keniston v. Roberts*, 717 F.2d 1295, 1301
18 (9th Cir. 1983). To survive a motion to dismiss, the complaint does not require detailed
19 factual allegations but must provide the grounds for entitlement to relief and not merely a

20
21 ² Because of the breadth of Nissen's allegations, the Court envisions the possibility of
22 multiple summary judgment motions to narrow the issues for trial. This may require a
scheduling conference in which Nissen outlines each theory under each claim in an effort to
assure that the parties and the Court have a clear picture of the issues in this proceeding.

1 “formulaic recitation” of the elements of a cause of action. *Twombly*, 127 S. Ct. at 1965.
2 Plaintiffs must allege “enough facts to state a claim to relief that is plausible on its face.”
3 *Id.* at 1974.

4 **B. First Amendment Retaliation**

5 “In order to state a claim against a government employer for violation of the First
6 Amendment, an employee must show (1) that he or she engaged in protected speech; (2)
7 that the employer took adverse employment action; and (3) that his or her speech was a
8 substantial or motivating factor for the adverse employment action.” *Coszalter v. City of*
9 *Salem*, 320 F.3d 968, 973 (9th Cir. 2003) (internal quotations omitted).

10 **1. Public Concern**

11 An employee’s speech is protected under the First Amendment if it addresses “a
12 matter of legitimate public concern.” *Pickering v. Bd. of Educ.*, 391 U.S. 563, 571
13 (1968). “[S]peech that concerns ‘issues about which information is needed or appropriate
14 to enable the members of society’ to make informed decisions about the operation of their
15 government merits the highest degree of first amendment protection.” *McKinley v. City*
16 *of Eloy*, 705 F.2d 1110, 1114 (9th Cir.1983) (quoting *Thornhill v. Alabama*, 310 U.S. 88,
17 102 (1940)). On the other hand, speech that deals with “individual personnel disputes
18 and grievances” and that would be of “no relevance to the public’s evaluation of the
19 performance of governmental agencies” is generally not of “public concern.” *Id.*

20 In this case, Defendants argue that Nissen’s speech was a matter of personal
21 interest. Dkt. 56 at 14. Defendants, however, rely on an extremely narrow interpretation
22 of matters of public concern. While Nissen may have had a personal interest in the

1 content of the public records she sought, the pursuit of the records clearly involved an
2 issue “about which information is needed or appropriate to enable the members of society
3 to make informed decisions about the operation of their government.” *McKinley*, 705
4 F.2d at 1114. In fact, one of Nissen’s cases established new law in the state regarding
5 whether a member of society could obtain information generated by a public official on
6 his or her private device. *See Nissen v. Pierce Cty.*, 183 Wn.2d 863, 888 (2015)
7 (“Records that an agency employee prepares, owns, uses, or retains on a private cell
8 phone within the scope of employment can be “public records” of the agency.”).
9 Therefore, the Court concludes that Nissen has asserted an allegation that she engaged in
10 constitutionally protected activity.

11 **2. Other Elements**

12 Nissen must also provide allegations that Defendants took an adverse employment
13 action motivated by her speech. *Coszalter*, 320 F.3d at 973. The Busto report submitted
14 with Nissen’s complaint provides sufficient information to meet these elements. In
15 general, Mark Busto, the independent attorney hired to investigate some whistleblower
16 complaints, found that the prosecutor’s office made specific requests to the sheriff’s
17 office to interfere with or alter Nissen’s conditions of employment. Dkt. 45-1 at 33–35.
18 These requests went beyond “minor acts” or “name calling,” as Defendants argue, and
19 amounted to significant interference with Nissen’s work and with transfers within the
20 sheriff’s office. *Id.* Nissen’s complaint asserts allegations consistent with the Busto
21 report. Dkt. 45, ¶¶ 6.38–6.41.

1 Similarly, the Busto report cites evidence supporting causation. Specifically,
2 Busto found that the prosecutor's office placed limitations on Nissen "because she had
3 filed numerous lawsuits and complaints against the office." Dkt. 45-1 at 35. Nissen's
4 complaint asserts allegations consistent with these findings, which are sufficient to state a
5 claim. Therefore, the Court denies Defendants' motion on Nissen's First Amendment
6 retaliation claim.

7 **3. Municipal Liability**

8 Defendants argue that Nissen has failed to state a claim for municipal liability
9 because she has failed to establish a permanent, widespread custom or policy, she has
10 failed to establish a final policymaker whose conduct can be attributed to the County, and
11 she has failed to identify a final policymaker that ratified the alleged conduct. Dkt. 56 at
12 16–20. In order to state a municipal liability claim, the plaintiff may allege that the
13 individual who committed the constitutional tort was an official with "final policy-
14 making authority" and that the challenged action itself thus constituted an act of official
15 governmental policy. *Gillette v. Delmore*, 979 F.2d 1342, 1346 (9th Cir. 1992).
16 Although less than clear, Nissen does include allegations that the sheriff has final
17 policymaking authority and personally participated in the alleged adverse employment
18 actions. Dkt. 45, ¶¶ 6.10, 6.11, 6.40. Thus, Nissen has stated a claim for municipal
19 liability.

20 **C. Conspiracy**

21 A claim of civil conspiracy to violate civil rights requires the existence of an
22 agreement or a meeting of the minds to violate the plaintiff's constitutional rights, and an

1 actual deprivation of those rights. *Avalos v. Baca*, 596 F.3d 583, 592 (9th Cir. 2010).
2 “To be liable, each participant in the conspiracy need not know the exact details of the
3 plan, but each participant must at least share the common objective of the conspiracy.”
4 *United Steelworkers of Am. v. Phelps Dodge Corp.*, 865 F.2d 1539, 1540–41 (9th Cir.
5 1989). Moreover, “[a] defendant’s knowledge of and participation in a conspiracy may
6 be inferred from circumstantial evidence and from evidence of the defendant’s actions.”
7 *Gilbrook v. City of Westminster*, 177 F.3d 839, 856–57 (9th Cir. 1999).

8 In this case, Defendants argue that Nissen fails to allege sufficient facts to support
9 a conspiracy. Defendants argue that Nissen “uses conclusory statements” to establish the
10 conspiracy instead of alleging facts. Dkt. 56 at 27. While the Court agrees that Nissen
11 includes numerous unnecessary and confusing conclusory statements, Nissen provides
12 sufficient factual allegations to state a concerted effort to violate her constitutional rights.
13 For example, Nissen alleges that Lindquist, numerous other prosecutors, “and Sheriff’s
14 Department officials . . . collectively retaliated against Nissen because she was not
15 Lindquist’s political supporter and she was a whistleblower who sought redress against
16 him and his office.” Dkt. 45, ¶ 6.3. Nissen also alleges that the “common objective
17 among Lindquist and his co-conspirators was to discredit and silence Nissen for refusing
18 to support Lindquist politically and for her whistleblower activities to include seeking
19 redress against him and his office.” *Id.* ¶ 6.4. Nissen goes on to list numerous
20 “[e]xamples of the extreme, unrelenting, and blatant actions against” her. *Id.* ¶¶ 6.6A–G.
21 To the extent that Nissen fails to allege a specific and explicit meeting of the minds,
22 under controlling law she has alleged sufficient facts to establish a common objective and

1 concerted action. *See Gilbrook*, 177 F.3d at 856–57. At the very least, she has asserted
2 sufficient allegations to infer concerted effort on a common objective of retaliation for
3 exercising her First Amendment rights. At the end of the day, the evidence may establish
4 only “conduct that *causes* other conduct, [instead of] an *agreement* to violate or to
5 disregard the law.” *United Steelworkers of Am.*, 865 F.2d at 1547 (Trott, J., dissenting).
6 “The latter, of course, is the essence of a conspiracy; the former is not.” *Id.* at 1547–48.
7 At this point, however, the Court is satisfied that she has asserted sufficient allegations to
8 overcome the motion to dismiss. Therefore, the Court finds that Nissen has stated a
9 claim and denies Defendants’ motion on this issue.

10 Defendants also argue that the conspiracy claim fails because the Court has
11 dismissed Nissen’s First Amendment claim against Nissen with prejudice. Dkt. 58 at 13.
12 Defendants fails to cite any authority for this proposition, which alone is sufficient reason
13 to dismiss the argument. The Court, however, ventured outside the record and discovered
14 non-binding authority for the proposition that a § 1983 “[c]onspiracy is merely the
15 mechanism by which . . . to impose liability on one defendant for the acts of the others
16 performed in pursuance of the conspiracy.” *Landrigan v. City of Warwick*, 628 F.2d 736,
17 742 (1st Cir. 1980) (citing *Nesmith v. Alford*, 318 F.2d 110, 126 (5th Cir. 1963), *cert.*
18 *denied*, 375 U.S. 975 (1964)). Thus, if Lindquist was not her employer and did not have
19 the power to engage in adverse employment actions in retaliation for Nissen’s protected
20 activities, then he allegedly could have conspired with Nissen’s supervisors to engage in
21 adverse employment actions. In other words, conspiracy is merely the mechanism to
22 impose liability on Lindquist for the acts of the sheriff’s office in pursuance of retaliation

1 against Nissen. Thus, Nissen has alleged sufficient facts to overcome a motion to dismiss
2 under these non-binding authorities.

3 **D. Fourteenth Amendment**

4 Nissen asserts claims for violations of both her procedural and substantive due
5 process rights. Regarding the former, Nissen is attempting to turn a defamation claim
6 into a constitutional due process claim. “The termination of a public employee which
7 includes publication of stigmatizing charges triggers due process protections.” *Mustafa*
8 *v. Clark Cty. Sch. Dist.*, 157 F.3d 1169, 1179 (9th Cir. 1998).

9 In this case, Nissen was not terminated. Instead, Nissen alleges that she was
10 forced to resign. Dkt. 45, ¶ 6.42. In other words, Nissen resigned from her position and
11 asserts that the County violated her constitutional rights by not giving her prior notice of
12 her resignation and an opportunity to contest her resignation. Thus, Nissen’s claim is
13 based on the publication of false charges instead of the loss of a liberty interest without
14 notice or an opportunity to contest false charges. Defamation, by itself, is not a violation
15 of liberty interests. *Paul v. Davis*, 424 U.S. 693, 706 (1976). Therefore, the Court grants
16 Defendants’ motion on Nissen’s procedural due process claim.

17 To the extent that Nissen argues that publication of false charges followed by an
18 employee’s resignation triggers an employer’s duty to provide a hearing to contest the
19 false charges, Nissen fails to provide any authority for this proposition. Thus, this
20 alleged claim fails as a matter of law.

21 Regarding substantive due process, Nissen’s allegations do not rise to the level of
22 a constitutional violation. In order to state a claim, Nissen must allege conduct that

1 makes “it virtually impossible for [her] to find new employment in [her] chosen field.”
2 *Engquist v. Oregon Dep’t of Agric.*, 478 F.3d 985, 997 (9th Cir. 2007) *aff’d* 553 U.S. 591
3 (2008). Instead, Nissen alleges that Defendants’ actions “diminished Nissen’s value as a
4 state’s witness and restricted her employability in the community in positions that she is
5 otherwise highly qualified to perform.” Dkt. 45, ¶ 6.67. This allegation does not rise to
6 the level of a constitutional violation. Therefore, the Court grants Defendants’ motion on
7 Nissen’s substantive due process claim. The Court also denies Nissen leave to amend a
8 third time. *See Reynolds v. City of Eugene*, 599 Fed. Appx. 667, 668 (9th Cir. 2015) (“A
9 district court’s discretion in deciding motions for leave to amend is ‘particularly broad’
10 when the court has already granted leave to amend.”).

11 **E. Interference with Business Expectancy**

12 A claim for tortious interference with a contractual relationship or business
13 expectancy requires five elements: (1) the existence of a valid contractual relationship or
14 business expectancy; (2) that defendants had knowledge of that relationship; (3) an
15 intentional interference inducing or causing a breach or termination of the relationship or
16 expectancy; (4) that defendants interfered for an improper purpose or used improper
17 means; and (5) resultant damage. *Leingang v. Pierce Cty. Med. Bureau, Inc.*, 131 Wn.2d
18 133, 157 (1997).

19 In this case, Defendants argue that Nissen has failed to state a claim because the
20 conduct regarding the alleged impeachment evidence is governed by absolute immunity,
21 Nissen’s collective bargaining agreement was not breached, and Lindquist was exercising
22 his legal interests by contesting her lawsuits and complaints. Dkt. 56 at 29–30. The

1 Court agrees with Defendants that these are all persuasive arguments if these were the
2 only allegations stated in the complaint. Instead, Nissen alleges at least three contracts
3 and future business expectancies as an expert witness. Dkt. 45, ¶ 6.81. Nissen also
4 alleges that Lindquist knew of these relationships and expectancies and interfered with
5 them to Nissen's detriment. Thus, Defendants have failed to address all of the allegations
6 asserted in the complaint. Although Nissen's allegations may be meritless, the Court
7 declines to *sua sponte* analyze the uncontested contracts and expectancies or allegations
8 of interference. In other words, Defendants have failed to show that Nissen has not stated
9 a claim upon which relief may be granted. Therefore, the Court denies Defendants'
10 motion on this claim.

11 **F. Wrongful Discharge**

12 Employees that are terminable for cause may assert a wrongful discharge claim
13 based on unlawful retaliation. *Riccobono v. Pierce Cty.*, 92 Wn. App. 254, 266 (1998).
14 Moreover, Washington courts allow claims for wrongful discharge in violation of public
15 policy where the employee alleges that she was discharged for "engaging in
16 'whistleblowing' activity.'" *Becker v. Cmty. Health Sys., Inc.*, 182 Wn. App. 935, 942
17 (2014), *aff'd*, 184 Wn.2d 252 (2015) (citing *Dicomes v. State*, 113 Wn.2d 612, 618
18 (1989)).

19 In this case, Defendants move to dismiss Nissen's claim because (1) she fails to
20 allege facts within the applicable statute of limitations, (2) she fails to establish the
21 elements for constructive discharge, (3) she relies upon inapplicable authority to support
22

1 her claim, (4) she relies upon conduct shielded by absolute immunity, and (5) she does
2 not identify clear public policy mandates. Dkt. 56 at 31–34.

3 First, Defendants argue that Nissen relies on conduct that occurred before the
4 applicable statute of limitations. The Court agrees. Although Nissen correctly cites
5 authority for the proposition that the statute of limitations begins to run when she
6 communicated her discharge to her employer, Dkt. 57 at 38 (citing *Barnett v. Sequim*
7 *Valley Ranch, LLC*, 174 Wn. App. 475, 486 (2013)), she argues that “she initially
8 established her whistleblower status prior to the statutory period of November 2, 2012.”
9 Dkt. 57 at 37–38. Nissen fails to explain how the three-year statute of limitations dates
10 back to November 2012 when she sent her letter of “forced resignation” on January 3,
11 2017. Regardless, Nissen alleges recent whistleblower activities of (1) continuing to
12 litigate a public record act case against the prosecutor’s office, (2) providing information
13 to Mr. Busto during the investigation of the whistleblower complaints, and (3) supporting
14 the police guild’s bar complaint against Lindquist. Dkt. 45, ¶ 6.92. These activities
15 occurred within three years from the date she gave notice of her resignation.

16 Second, Defendants argue that Nissen fails to allege facts to support a constructive
17 discharge. Dkt. 56 at 32–33. Nissen, however, has alleged facts of ongoing harassment,
18 bullying, work restrictions, and other intolerable conditions that the Court finds sufficient
19 to state a claim. Dkt. 45, ¶¶ 6.97–6.99. Moreover, Nissen alleges that the intolerable
20 conditions lasted up until the date of her separation, which is within the statute of
21 limitations. Therefore, the Court finds that Nissen has alleged sufficient facts to support
22 a claim of constructive discharge.

1 Finally, Defendants contend that the alleged acts of the prosecutors are shielded by
2 absolute immunity and Nissen improperly cites statutes protecting state employees. Dkt.
3 56 at 33. While Nissen does allege facts regarding potential impeachment evidence, she
4 also alleges numerous other facts regarding the conditions of her employment that are
5 outside the official duties of a prosecutor. For example, Nissen alleges that prosecutors
6 publically disparaged her by calling her a “suspect,” “bipolar,” “obsessed,” and “crazy.”
7 Dkt. 45, ¶ 6.98. Nissen also alleges that the Pierce County Code establishes the clear
8 public policy that whistleblowers shall not be retaliated against. *Id.* ¶ 6.92 (citing PCC
9 3.14). Therefore, the Court finds that Nissen has alleged sufficient facts to state a claim
10 for wrongful discharge in violation of public policy and denies Defendants’ motion on
11 this claim.

12 **G. Outrage**

13 In order to state a claim for intentional infliction of emotional distress, the plaintiff
14 must allege: “(1) extreme and outrageous conduct; (2) intentional or reckless infliction of
15 emotional distress; and (3) actual result to plaintiff of severe emotional distress.” *Kloepfel*
16 *v. Boker*, 149 Wn.2d 192, 195–96 (2003) (citations omitted). This tort also is
17 synonymous with the tort of “outrage.” *Id.* “The question of whether certain conduct is
18 sufficiently outrageous is ordinarily for the jury, but it is initially for the court to
19 determine if reasonable minds could differ on whether the conduct was sufficiently
20 extreme to result in liability.” *Dicomes*, 113 Wn.2d at 630.

21 In this case, Defendants argue that Nissen has failed to allege conduct sufficiently
22 outrageous to support a claim. Dkt. 56 at 35–36. The Court disagrees. Nissen has

1 alleged that prosecutors falsely stated that Nissen was the suspect of a crime, she had
2 mental health issues, and she was a liar and dishonest. Dkt. 45 at 6.115. The Court finds
3 that a reasonable jury could conclude such conduct of an alleged concentrated effort by a
4 prosecutor's office to attack a police officer with false claims is extreme and outrageous.
5 Therefore, the Court denies Defendants' motion on this claim.

6 **H. Breach of Contract**

7 In order to state a claim for breach of contract, Nissen must allege the existence of
8 a valid and enforceable contract, her rights and Defendants' obligations under the
9 contract, a violation of the contract by Defendant, and damages. *Citoli v. City of Seattle*,
10 115 Wn. App. 459, 476 (2002)

11 In this case, Nissen has stated at least one valid breach of contract claim. Nissen
12 has alleged a valid settlement agreement between her and the County. Dkt. 45-1 at 58–
13 59. The County agreed that it would not retaliate against Nissen for bringing her
14 complaint against the County and the prosecutor's office. *Id.* Nissen alleges that County
15 employees breached this provision by retaliating against her, and Nissen alleges resulting
16 damages. Dkt. 45, ¶¶ 6.128–6.133. Therefore, Nissen alleges at least one valid breach of
17 contract claim upon which relief may be granted, and the Court denies Defendants'
18 motion on this issue.

19 **I. Marital Community**

20 Defendants move to dismiss Lindquist's marital community because Nissen fails
21 "to identify any link between the alleged conduct and the management of the
22 community" and "also fails to identify any direct benefit conferred to the community

1 from any of the alleged, untruthful conduct.” Dkt. 56 at 40. Nissen, however, has
2 alleged that “Lindquist has used his office to promote himself and his community for
3 personal and financial gain.” Dkt. 45, ¶ 2.2. Nissen argues that “[a]n official’s bad acts
4 while carrying out his purported public duties obligate the community.” Dkt. 57 at 46
5 (citing *Kilcup v. McManus*, 64 Wn.2d 771, 779 (1964)). Defendants counter that
6 “[n]owhere in *Kilcup* does the court pronounce such a rule.”³ The Court agrees with
7 Defendants that Nissen misrepresents *Kilcup* in paraphrasing the case to hold that all
8 “bad acts” obligate a community. More accurately, Defendants cite the case for the
9 proposition that acts involving “ignorance, carelessness or mistaken ideas” obligate a
10 community. Dkt. 58 at 19 (citing *Kilcup*, 64 Wn.2d at 781). The court also stated that an
11 official who exercises his powers “negligently, or in excess of his authority, or
12 maliciously, does not relieve his community of liability as long as he was acting under
13 the color or purported authority of his office.” *Kilcup*, 64 Wn.2d at 782. Nissen has
14 stated a claim for outrage, which includes reckless conduct. In the absence of contrary
15 authority in the record, it would seem that acting recklessly would at least equate to
16 acting maliciously. Therefore, at this point, Defendants have failed to show that Nissen
17 has failed to state a claim against Lindquist’s community, and the Court denies the
18 motion on this issue.

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21 ³ The Court agrees with Defendants and uses this as one example of Nissen’s pleading
22 practice that unnecessarily increases the work for Defendants and the Court. In Nissen’s 238
footnote cites, she repeatedly cites cases generally without pinpointing the portion of the case she
is relying upon.

1 **IV. ORDER**

2 Therefore, it is hereby **ORDERED** that Defendants' motion to dismiss (Dkt. 56) is
3 **GRANTED in part** and **DENIED in part**. Nissen's Fourteenth Amendment claims are
4 **DISMISSED with prejudice**. The parties shall file a joint status report regarding a
5 proposed trial schedule no later than January 26, 2018.

6 Dated this 18th day of January, 2018.

7 

8 BENJAMIN H. SETTLE
9 United States District Judge